

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,
Plaintiff,
v.
LAWSON SOFTWARE, INC.,
Defendant.

:
:
:
:
: Civil Action
: No. 3:09CV620
:
: September 8, 2010
:

COMPLETE TRANSCRIPT OF **CONFERENCE CALL**
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES: (All via telephone)

Scott L. Robertson, Esq.
Jennifer A. Albert, Esq.
GOODWIN PROCTOR
901 New York Avenue, NW
Washington, D.C. 20001

Craig T. Merritt, Esq.
Henry I Willett, III, Esq.
CHRISTIAN & BARTON
909 E. Main Street, Suite 1200
Richmond, VA 23219-3095

Counsel for the plaintiff ePlus

DIANE J. DAFFRON, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

1 APPEARANCES: (Continuing)

2 Daniel McDonald, Esq.

William D. Schultz, Esq.

3 MERCHANT & GOULD

3200 IDS Center, 80 S. Eighth Street

4 Minneapolis, MN 55402

5 Kirstin L. Stoll-DeBell, Esq.

MERCHANT & GOULD

6 1050 17th Street, Suite 1950

Denver, CO 80265

7

Dabney J. Carr, IV, Esq.

8 TROUTMAN SANDERS

Troutman Sanders Building

9 1001 Haxall Point

P.O. Box 1122

10 Richmond, VA 23218-1122

11 Counsel for the defendant Lawson Software

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (The proceedings in this matter commenced at
2 3:30 p.m.)

3 THE COURT: Hello.

4 MR. McDONALD: Good afternoon, Judge. This
5 is the ePlus Lawson counsel on the line.

6 THE COURT: Okay. Why don't you-all give
7 your names please for the record.

8 MR. McDONALD: On behalf of ePlus at
9 Christian & Barton you have Craig Merritt and Henry
10 Willett.

11 MR. ROBERTSON: From Goodwin Proctor, this is
12 Scott Robertson and Jennifer Albert on the phone as
13 well.

14 MR. CARR: For Lawson Software, this is
15 Dabney Carr at Troutman Sanders.

16 MR. McDONALD: Good afternoon, Your Honor.
17 Also for Lawson, Dan McDonald, Will Schultz and
18 Kirstin Stoll-DeBelle from Merchant & Gould.

19 THE COURT: All right. Thank you for being
20 available.

21 As I was reflecting upon our conversation
22 yesterday, I realized that I was looking at a segment
23 of the calendar where there's a fairly lengthy jury
24 trial that's going to be tried as well as a civil case
25 that's already set in that same period of time for

1 several days. And I was anticipating that some of
2 those things might move, and I don't believe that they
3 are going to move.

4 And of the trial dates that you all have in
5 there, you have a jury selection on the 30th, three
6 days, and then the next week is five more days.
7 That's nine days or eight days. And then a couple of
8 days, three days the next week or four. And then I'm
9 gone and not going to be here for two weeks. So I'm
10 not sure that even if I can move those cases that -- I
11 know I can move them, but even if I were to move them,
12 that we would be finished with your case unless I just
13 arbitrarily say you've got each a total of X hours,
14 and that's the end of it, and leave the jury time to
15 deliberate and have the instructions and the argument.

16 So you're telling me that you had nine days'
17 worth of evidence. So I don't think that period of
18 time works if you've got that much evidence. I
19 realize that if you don't have a damages case, you're
20 not going to have quite as much as you thought you
21 were going to have, but ordinarily the damages case
22 doesn't really take up a great deal of time because of
23 the way it tends to be presented and the nature of
24 cross-examination.

25 Did you ever, Mr. Robertson, go back and talk

1 to your man and see if he could have his block or
2 whatever it was the week of the 13th of September
3 instead of the week of the 20th?

4 MR. ROBERTSON: (Unintelligible.)

5 THE COURT: I can't hear you, Mr. Robertson.
6 Sorry.

7 MR. ROBERTSON: I'm sorry. I talked to
8 Dr. Weaver this morning. Mr. McDonald asked me to.
9 And as you might have expected, Your Honor, when we
10 set the schedule yesterday, we started moving a lot of
11 parts, including sending computer equipment back and
12 shutting hotels down.

13 I did talk to Dr. Weaver. He started
14 scheduling some other things to get them out of the
15 way. But can I ask the Court a question given the
16 schedule you just suggested because Dan McDonald and I
17 talked this morning? And if you were to impanel a
18 jury on the 30th, would I assume that we would start
19 with opening statements and move forward with our
20 first witness perhaps that afternoon, and then proceed
21 for three more days from Friday, December 3, and then
22 project to end on December 10 the trial? And if
23 that's the suggested timeline, I think Mr. McDonald
24 and I can work within that. I don't want to speak for
25 Mr. McDonald, but we did talk this morning, and we

1 were talking about the length of the trial. And if
2 that were the timeline, I think we could equitably
3 distribute the time to get that accomplished, if I was
4 understanding Your Honor correctly, but perhaps I
5 wasn't.

6 THE COURT: Well --

7 MR. ROBERTSON: I won't speak for Mr.
8 McDonald. I'll let him speak for himself.

9 THE COURT: Well, do you think you-all could
10 try it in that period of time?

11 MR. McDONALD: Your Honor, this is Dan
12 McDonald speaking. My understanding is we were going
13 to pick the jury on the afternoon of the 29th, and
14 then come back the first thing in the morning on
15 Wednesday, December 1st, get going with openings and
16 go right into witnesses from there.

17 I understand we have three days that week and
18 five days the next week. And if I understood right,
19 we would have Monday the 13th and also Tuesday the
20 14th to wrap it up. Is that right?

21 THE COURT: No. That's what I'm saying. No,
22 you don't because I am gone beginning the crack of
23 dawn the 17th. So if you took until the 14th, that
24 doesn't leave the jury but two days. I don't know
25 what they're going to do, but what it means is if the

1 jury doesn't finish deliberation on the 16th, and I
2 don't know what you mean by "wrap up," whether you
3 mean wrap up the evidence or wrap up with closing
4 arguments, then the jury is down until after the first
5 of the year. The jury is gone for two weeks, and I
6 don't think that's a very good way to do it.

7 MR. McDONALD: Well, one thing I've seen
8 before, and if you don't do this, I can appreciate it,
9 but I have seen when a judge was unavailable that
10 another judge or even a magistrate will step in if the
11 jury comes back while the judge that tried the case is
12 unavailable. So if the jury does need more than two
13 full days, which obviously is a question, somebody
14 else could step in at that point.

15 Is that something you would be receptive in
16 doing?

17 THE COURT: In many kinds of cases I will do
18 that, and I've done it both ways, but in this case
19 with all the rulings that I've made and all the
20 background, I think it would be a troublesome thing to
21 do to another colleague. And there's really only one
22 person who could do it, and that's Judge Hudson
23 anyway, and he's got other commitments in December, I
24 think, if I remember correctly.

25 MR. ROBERTSON: Your Honor, this is

1 Mr. Robertson. If I could just react to that. Let me
2 make sure I understand because the dates shifted on me
3 a little. If we were picking the jury on Monday the
4 29th, and starting on the 30th, we would have nine
5 days to complete by the 10th. And that would likely
6 give us a window for the jury to deliberate if you had
7 to leave, and I understood you to say on the morning
8 of the 17th for four days. I would consent to having,
9 if it went beyond that, and I don't foresee that
10 happening, I can't envision that happening, but I
11 would consent to having Magistrate Judge Dohnal serve
12 in the role that Mr. McDonald just suggested in the
13 unlikely contingency that that would happen. And I
14 think Magistrate Judge Dohnal has some experience with
15 the case.

16 THE COURT: I know he does, but he's been
17 involved in the settlement, and both sides would have
18 to consent to that before it would happen. And I
19 haven't checked to see if he's here at that time, but
20 I think actually we were talking about doing the jury
21 selection on the 30th. I did say the 29th, but I
22 realized that's the Monday after Thanksgiving and
23 moved it to the 30th, I think, and then starting the
24 evidence on the 1st, which is a Wednesday, and then
25 the 2nd and the 3rd.

1 Under your discussion, you-all would be
2 finished by the 10th of December, and the jury would
3 have the case the Monday, Tuesday, Wednesday, and
4 Thursday. And I believe you told me the jury
5 deliberated four days in one of these trials. I'm not
6 going to say that's going to happen again, but what
7 was the first trial? How long did that one go?

8 MR. ROBERTSON: Six hours, Your Honor.

9 THE COURT: I also have another question for
10 you-all. It may have an impact on this. And that is
11 since there are no damages issues and the injunction
12 is the only remedy that's available, is this really a
13 case where a jury is appropriate in any event?

14 MR. ROBERTSON: This is Mr. Robertson, Your
15 Honor.

16 THE COURT: Have you all looked at that?

17 MR. ROBERTSON: I have bumped into this issue
18 once or twice before in my practice, and I think
19 notwithstanding the fact that the Court's ruled that
20 damages are out of the case, at the time of the
21 pleading it was a cause of action at law, and a jury
22 trial was requested, and that's the key. And these
23 are infringement and validity are issues of fact. So
24 I think under the authority I'm fairly confident that
25 the Seventh Amendment is implicated and a jury trial

1 is warranted.

2 If the Court would like, I could brief that.
3 I haven't discussed -- if the Court is raising the
4 prospect of waiving a jury trial, I haven't discussed
5 that with my client.

6 THE COURT: No, I wasn't raising the prospect
7 of waiving a jury trial. I was raising the question
8 whether a jury is appropriate in this case now, which
9 if the answer is no would change the dynamic of the
10 discussion we're having now. That's why I raised it.

11 Mr. McDonald, what's your understanding?

12 MR. McDONALD: Your Honor, this is Dan
13 McDonald speaking for Lawson.

14 I'm not sure what the answer is to your
15 question. Mr. Robertson may be right, but I think
16 I've also seen some law that does decide whether or
17 not you're entitled to a jury has to do with the
18 relief available, which means that if it was an
19 injunction, it may well be a judge trial.

20 What I'm grappling with a little bit is just
21 wanting to make sure we've got all the right bases
22 covered. And if it had to be a jury, I'd rather the
23 jury got it the first time if there's any doubt about
24 it is kind of my initial reaction to that.

25 So I'm not ready to go away from having a

1 jury or to advocate for that at this point, but I
2 think, honestly, you raise a fair point.

3 THE COURT: Well, look at it and let me know
4 what you-all think about it. You can file your
5 brief -- what is today? Wednesday? When do you want
6 to file your brief on it, Mr. Robertson?

7 MR. ROBERTSON: May I have a week, Your
8 Honor?

9 THE COURT: Yes, that'll be fine.
10 When do you want to file your brief?

11 MR. McDONALD: Could I have a week after
12 that, Your Honor?

13 THE COURT: Sure.

14 MR. McDONALD: Thank you.

15 THE COURT: All right.

16 MR. ROBERTSON: May I have a two-day reply,
17 Your Honor?

18 THE COURT: Yes.

19 MR. ROBERTSON: Thank you.

20 THE COURT: Now, back to the original
21 question. When you were discussing with your man --
22 what's his name? Dr. Weaver?

23 MR. ROBERTSON: Dr. Weaver.

24 THE COURT: Did you ask him if he could have
25 his procedure this coming week so he would be

1 available to testify the 20th?

2 MR. ROBERTSON: I did, Your Honor, and he
3 cannot.

4 THE COURT: Okay.

5 MR. ROBERTSON: He had some other procedures,
6 and, Your Honor, I did release a book of my hotels
7 just yesterday, sir.

8 THE COURT: They'll be glad to have them
9 back. They're anxious to have people. I wouldn't
10 worry too much about getting the hotels back.

11 MR. ROBERTSON: It's not been that easy, Your
12 Honor, but I appreciate it, but I do have some
13 problems with not only that. I've been playing a
14 little ping-pong with my inventors who I don't really
15 completely control. So that's going to be difficult.

16 THE COURT: Look, Mr. Robertson. Let me tell
17 you something. There's no difficulty in a 24-hour
18 period in saying we're going back to the way we were.
19 And that happens. Because they haven't rented all
20 these rooms and your guys haven't made any irrevocable
21 plans. The controlling issue, in my mind, is whether
22 or not the doctor can have his procedure during the
23 13th. And if he can't, then he can't. And you've
24 asked him that, and he's told you he can't, and that
25 answered the question. So I understand that.

1 Well, I suppose we can pick a jury beginning
2 on the 29th and have opening statements and
3 arguments. And if I'm going to have to clear the
4 afternoon of the 30th, I'm going to have to clear the
5 whole day anyway. So I can see if other people can do
6 these things and get them straightened out, but you're
7 going to have to be -- that means you would be
8 finished with the entire case, and it would go to the
9 jury on the afternoon of the 10th of December. And
10 then the jury would have three days or so to
11 deliberate, I think. I don't think there's any real
12 risk it will go much longer than that. But anyway,
13 can you all do that?

14 MR. McDONALD: Yes, Your Honor, the
15 plaintiffs can.

16 MR. ROBERTSON: I believe so, Your Honor.
17 Just to clarify. So we pick the jury on the
18 afternoon of the 29th, and then start the case on the
19 30th?

20 THE COURT: Well, we'll pick the jury
21 probably beginning in the morning around 11:00. That
22 gives everybody time to get off the road. You're
23 going to have to come in the day before anyway. And
24 then you'll pick the jury and do the opening
25 statements on the 29th, and start with the evidence on

1 the morning of the 30th.

2 And then you have four days that week and
3 five days the next week in which to complete the
4 evidence, complete the instructions, and complete your
5 closing argument and instruct the jury.

6 Now, that means that the 10th is going to be
7 basically devoted to instructing the jury. And
8 you're, in effect, going to have to be finished by
9 December the 9th, which gives you one, two, three,
10 four, five, six, seven, eight, nine days.

11 MR. McDONALD: Your Honor, this is McDonald
12 talking again.

13 I was just wondering, I think I'd feel a
14 little better about the squeeze here if we could carry
15 it over to the 13th if absolutely necessary. That
16 would still give us two or three days with the jury
17 deliberations before you leave. And if we can all
18 stipulate, which I think we probably could, that if
19 Judge Dohnal is available, that he could take care of
20 the jury after you have to leave if they are still
21 deliberating. Is that an option?

22 THE COURT: I don't have a problem with that,
23 but I also will tell you that it could be a problem
24 given the nature of this case.

25 MR. ROBERTSON: I would stipulate to it, Your

1 Honor.

2 THE COURT: But I'm not interested in having
3 you-all put on evidence on the 13th at all. I want a
4 fixed period of time. If you start on the 29th, and
5 if we're going to start on the 29th, you can actually
6 start with some of your witnesses that day, I guess,
7 as long as we're going to have a jury here. I was
8 going to try to give them a little time to get their
9 lives straight before they have to sit for a while.

10 That gives you nine or ten days to get the
11 case tried. How would you propose to split it up,
12 those ten days, nine days?

13 MR. ROBERTSON: Equitably, I would think.
14 Mr. McDonald is a professional. I could work with
15 him. I think that would be a fair lot.

16 MR. McDONALD: This is Mr. McDonald speaking
17 again, Your Honor.

18 My contemplation in asking about Monday, I
19 think it's consistent with what you were suggesting
20 that maybe we need all day on Friday the 10th to get
21 all the evidence in, and we maybe can't quite get to
22 the point of instructing the jury by then, but then
23 that could carry over to the 13th, and I think even
24 having that little extra leeway I would feel
25 comfortable today saying yes, we can make that work.

1 THE COURT: No, because what that means is
2 you're not even going to make the arguments until the
3 13th. If you're putting on evidence on the 10th,
4 you're not going to make the arguments until the
5 13th. And those arguments are going to take the
6 better part of the day. And the instructions will
7 take what? How many hours do you think? You've had
8 the instructions before in this case, Mr. Robertson.
9 How long did Judge Spencer and Judge Brinkema take?

10 MR. ROBERTSON: My memory, Your Honor, is it
11 takes about two hours.

12 THE COURT: Yes, that's what I was going to
13 say. Two to three hours probably for these cases.
14 That basically means that the 13th would be not
15 available for deliberation.

16 MR. ROBERTSON: Mr. McDonald asked me a
17 question. I don't know if you heard, Your Honor. In
18 the case of SAP, the plaintiff went for about an hour
19 and a half in closing, and the defendant had an hour
20 and a half. And then there was about 20 or 30 minutes
21 rebuttal.

22 So that's three and a half hours. And then
23 two hours of jury instructions, two and a half. So
24 the Court is right. That's a full day, effectively,
25 of argument and instructions.

1 THE COURT: Which I would have the 10th be
2 that day. And we would start picking the jury --

3 MR. McDONALD: This is McDonald speaking
4 again.

5 I think Mr. Robertson and I would make our
6 best efforts to endeavor to be ready by the 10th, but
7 if we could have that 13th available as an overflow or
8 whatever you want to call that, that if we can't get
9 the evidence done by the end of the day on the 9th,
10 I'd feel more comfortable with that. So I like having
11 that back-up plan of having Judge Dohnal being
12 available.

13 THE COURT: I understand what you're saying.
14 I'm just not prepared to agree with it. If we're
15 going to go over to do more than what we're talking
16 about in terms of trial days, they're going to be in
17 the immediate weekend, Saturday.

18 MR. McDONALD: Okay. That'll be fine.

19 THE COURT: What I don't understand,
20 Mr. Robertson, is how much time do you need to try
21 your case? That's the first thing. You threw out the
22 figure of three to four days yesterday, and I just am
23 not sure as I reflect on it why you're going to need
24 all that time. You've tried the case before. So tell
25 me what you're talking about. It will help me.

1 MR. ROBERTSON: I'm not quite sure if I said
2 three to four days, Your Honor. What I recall is in
3 the past it's been between four and five days.
4 Typically four and a half.

5 THE COURT: I may have misremembered. I'm
6 not going to stake that ground out. I may have
7 misrecalled it.

8 MR. ROBERTSON: That's about where I am, Your
9 Honor.

10 THE COURT: What do you do for five days?
11 What are you doing for four or five days?

12 MR. ROBERTSON: There's the inventors who
13 typically testify. There's Dr. Weaver, who needs to
14 pull together a lot of disparate facts. There's some
15 adverse witnesses I'm going to need to call with
16 respect to certain admissions. And that isn't always
17 an easy witness to put on when you're doing that, but
18 I try to stay as focused as possible. I don't try to
19 spin wheels up there, Your Honor.

20 I've done this case twice in the Eastern
21 District of Virginia and the judges are very vigilant
22 about cumulative evidence coming in.

23 THE COURT: I know.

24 MR. ROBERTSON: Not coming in.

25 THE COURT: That's why I'm asking you.

1 MR. ROBERTSON: That's where I was. I think
2 it was eight days with Judge Brinkema total. My
3 memory is, Mr. Carr is on the phone, it was longer
4 than that in the SAP case, but that's my memory. But
5 again, maybe I'm biased. The plaintiffs took far less
6 time than the defendants took in that case. I
7 wouldn't say far less, but the total time, we were at
8 least a day and a half less than they were.

9 I try to put my case on efficiently. I don't
10 want to put anybody to sleep. I know it's a patent
11 case. It's not exactly a capital punishment case, but
12 I'm going to try to get it done as fast as I can. I
13 have no interest in delaying this. It doesn't help my
14 case unless I put it on quickly and efficiently, but
15 it's a patent case, Judge. I'm sure you appreciate
16 that.

17 THE COURT: I know, but patent lawyers
18 generally tend to think they need more time to do
19 things than really they do sometimes.

20 Mr. McDonald, how long do you envision your
21 case being?

22 MR. McDONALD: About four days, four and a
23 half days, Your Honor.

24 THE COURT: All right. What are you going to
25 do?

1 MR. McDONALD: Well, we've got prior art
2 systems. We've got our IBM witnesses. Two people
3 they're talking about, that TB2 system. We've got the
4 appeal writer witness. We have the J-CONN witness.
5 We've got our Lawson people to explain our system on
6 why we don't infringe. And we've got our expert, Mr.
7 Seamus, who's going to cover invalidity and
8 noninfringement.

9 So we have to defend against noninfringement
10 and also prove invalidity on our side of the case.
11 I'm not including our cross-examination of their
12 witnesses, but we'll be cross-examining their
13 witnesses as well. That's really part of our case.

14 As we understand it, Judge, on this issue,
15 just so I can clarify because I think it's relevant
16 here, when ePlus calls the inventor, these third-party
17 inventors to the stand, is it appropriate for us to
18 assume that we exhaust that witness while they're on
19 the stand? For example, if we need to get into
20 invalidity issues with a particular witness because
21 that witness has relevant evidence of that, we do it
22 at that time or do they get recalled?

23 THE COURT: That really depends upon the
24 agreement of the parties in part and upon the way that
25 testimony goes.

1 I've found that it can be quite confusing to
2 a jury to be having the defense case in patent cases
3 being put on while the infringement case is being put
4 on, and they don't understand what's what. It's hard
5 enough for them anyway to follow these instructions
6 and these concepts. So I'm not much inclined to do
7 that in a complex case.

8 I don't know what Mr. Robertson's inclination
9 is to have these people called out of order while they
10 are all on the stand.

11 MR. ROBERTSON: Let me respond to that and
12 raise one other point. I guess -- I understand Your
13 Honor's sort of standard procedure to be if it's
14 within the scope of the direct, it's open to cross,
15 but if it's not within the scope of direct, it's not
16 open to cross-examination. That's just your standard
17 operating procedures.

18 I will see if I can reach an accord with Mr.
19 McDonald. What I don't want to have happen is while
20 the clock is ticking for me, the defendant is spending
21 a lot of time trying to prove its defenses.

22 One other point I want to make, of course,
23 Your Honor, is Mr. Hilliard, our validity expert, he's
24 a rebuttal witness. And so we do have a rebuttal
25 case. That is to call back our validity experts who

1 then have rebutted the defendant's invalidity evidence
2 which they're going to put on. That typically takes
3 about three-quarters of a day. So I just wanted to
4 put that out there.

5 As Mr. McDonald noted, if the Court is
6 willing to do it and the jurors are game, I'm
7 perfectly willing to go on a Saturday as well. I just
8 wanted the Court to be aware of that.

9 THE COURT: All right. Well, I've got what
10 your thinking is, and I appreciate it. I think that
11 maybe it may be smarter just to try this case in
12 January based upon what I'm hearing. I think that
13 would probably make more sense. And then you're not
14 constrained to the same extent that you are in
15 December.

16 This cause is fraught with all kinds of
17 problems and difficulties between the parties and
18 between counsel, and I am apprehensive about the
19 fairness, not to Judge Dohnal because I think he can
20 handle it, but the fairness to the record and the
21 parties in just walking out the door with the case not
22 being tried.

23 So you-all have the first couple weeks in
24 January available, do you?

25 MR. ROBERTSON: This is the plaintiff,

1 Mr. Robertson, Your Honor. Yes.

2 MR. McDONALD: For Lawson, Mr. McDonald, Your
3 Honor.

4 It's fine with me and for my team. I haven't
5 had a chance to talk to the witnesses about that date,
6 but we'll certainly do everything we can to make it
7 work, and I'll let you know right away if we have any
8 issues. I'm not aware of any.

9 THE COURT: All right. I think what we're
10 going to do then is have the trial start on January
11 the 4th. We'll pick the jury and go right into
12 opening statements or whatever.

13 Do you all want to use the judicial center
14 DVD?

15 MR. ROBERTSON: This is Mr. Robertson, Your
16 Honor.

17 We discussed that. I believe Mr. McDonald
18 agreed on that.

19 MR. McDONALD: That's correct.

20 THE COURT: All right. That's fine. That
21 takes what? About 20 minutes?

22 MR. McDONALD: I think so.

23 THE COURT: All right.

24 MR. ROBERTSON: Your Honor, this is
25 Mr. Robertson. Can I just ask a question, sir, about

1 this briefing on the jury trial issue then?

2 Given that we have a trial in January, and I
3 was thinking maybe we were a little more pressed for
4 time, can I raise two points? One, if Mr. McDonald
5 and I both agree that we think the jury trial is
6 appropriate, would the Court still request that
7 briefing? If so, fine. But if both parties agree
8 they want to proceed with a jury, I would think that
9 would be unnecessary. And I don't want to spend money
10 where we don't have to.

11 If the Court still wants that briefing, I'm
12 happy to do it. Given that we have a little bit more
13 time, I guess I would ask for a little bit more time
14 to give some thought to it and provide the Court with
15 more thoughtful briefing. So rather than doing it
16 within a week, I would ask until September 20, and
17 then I would give Mr. McDonald as much time as he
18 would like.

19 MR. McDONALD: I appreciate that.

20 Would you like me to respond to that, Your
21 Honor? I think that would help.

22 THE COURT: Yes.

23 MR. McDONALD: I think there is a decent
24 chance, I know you think Mr. Robertson and I disagree
25 on everything, and maybe generally that's a good rule

1 of thumb, but I think there is some chance that we
2 might agree on this issue if we get a chance to talk
3 about it that might obviate the need for briefing and
4 a decision on your part if you are agreeable to that.

5 And, as Mr. Robertson said, if you want
6 briefing anyway, we'll certainly do that.

7 THE COURT: I don't want to put you-all to
8 the needless task of briefing something, nor do I --
9 I'm not fishing to try the case and be the finder of
10 the fact. I'm just concerned about this issue. And
11 if we don't need to take up the time of a jury to do
12 this because there isn't anything for a jury to
13 decide, then okay.

14 I have a recollection that there are cases on
15 both sides of the issue, but I have never actually had
16 it come up, and I haven't had time to look at it. So
17 if you-all can agree on what you want to do, then I
18 think that makes sense. So why don't you-all see if
19 you can do that.

20 MR. ROBERTSON: Thank you, Your Honor. This
21 is Mr. Roberson again.

22 THE COURT: We need to have a date for the
23 final pretrial conference, though, don't we? What is
24 it?

25 MR. ROBERTSON: That's what I was just going

1 to raise with Your Honor. This is Mr. Robertson.

2 Mr. McDonald and I spoke again this morning,
3 and in the spirit of cooperation, we've been talking
4 about we've been making significant progress, and we
5 took the Court's statements yesterday about our
6 exhibits to heart, and we've been working earnestly to
7 try and reduce those. And we also are looking back at
8 our deposition designations and other issues that
9 might arise.

10 And the suggestion I had, and Mr. McDonald
11 indicated that I think he would be in agreement, but,
12 again, I won't speak for him, is that if we did have a
13 little bit more additional time, we ultimately could
14 save the Court time in dealing with the final pretrial
15 conference.

16 It was scheduled for the 15th, perhaps going
17 over to the 16th. I think if we pushed it out perhaps
18 a week, it would significantly shorten the time that
19 the Court would have to devote to the issues being
20 raised.

21 THE COURT: The 15th of September?

22 MR. ROBERTSON: September 15, yes, sir.

23 MR. McDONALD: That's the current date, Your
24 Honor. This is Mr. McDonald speaking. I think
25 Mr. Robertson is proposing a week after that, and if I

1 could respond to that.

2 I generally agree with Mr. Robertson's
3 comments. But I guess what I was envisioning -- and
4 Scott, maybe we didn't talk about this specifically --
5 is I think we could come out with a substitute
6 pretrial order that is significantly streamlined from
7 what was already filed. I know we have many issues in
8 the existing pretrial order that are gone.

9 THE COURT: I think that's a good idea. So
10 what do you want to do? Do it on the 22nd of
11 September? Is that what you're saying? You said a
12 week later.

13 MR. ROBERTSON: That's fine, Your Honor. I'd
14 like to push it out later if that's available to the
15 Court, and the Court's agreeable to that, and I don't
16 disagree with what Mr. McDonald has just suggested.

17 MR. McDONALD: I guess, Your Honor, I was
18 contemplating not waiting a long time. I know the
19 trial is a ways away, but also I wanted to kind of
20 strike while the iron is hot. Maybe get a substitute
21 pretrial order filed next week and have the pretrial
22 conference the week after that. Something like that.
23 But, obviously, whatever Your Honor wants to do is
24 fine.

25 THE COURT: How about Monday, the 27th of

1 September?

2 MR. ROBERTSON: That's fine.

3 MR. McDONALD: When would you like the
4 substitute pretrial order, Your Honor?

5 THE COURT: The 23rd.

6 MR. McDONALD: That works fine for counsel
7 for Lawson.

8 THE COURT: Okay. All right, gentlemen.
9 Thank you all, ladies. Excuse me. I got you in
10 there. Did you hear me?

11 MS. ALBERT: Yes.

12 THE COURT: I just hadn't heard you talking.
13 So I was focused wrong.

14 MS. ALBERT: Thank you, Your Honor.

15 MR. CARR: Your Honor, this is Dabney Carr.
16 What time on the 27th would you like to have that
17 hearing?

18 THE COURT: I'm sorry. I thought I said at
19 10 o'clock. I wrote it down and I may not have said
20 it. Thank you for reminding me.

21 MR. McDONALD: Thank you, Your Honor.

22 MS. ALBERT: Thank you.

23 THE COURT: All right. That takes care of
24 things, and we'll get things going from there. Thank
25 you so much. Bye-bye.

1 MR. ROBERTSON: Bye-bye.

2 (The proceedings were adjourned at 4:06 p.m.)

3 I, Diane J. Daffron, certify that the
4 foregoing is a true and accurate transcription of my
5 stenographic notes.

6 /s/ 9/20/10
7 _____
8 DIANE J. DAFFRON, RPR, CCR DATE
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25